



Administrative Tribunal

Distr.
LIMITED

AT/DEC/671
4 November 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 671

Case No. 731: GRINBLAT

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Jerome Ackerman,
Vice-President; Mr. Francis Spain;

Whereas, on 19 May 1993, Joseph Alfred Grinblat, a staff
member of the United Nations, filed an application with the
Tribunal;

Whereas, on 3 December 1993, the Applicant amended his pleas
to request the Tribunal:

"7. To rescind the decision of the Secretary-General of
12 April 1993 (...), which was based on the recommendation of
the Joint Appeals Board dated 7 April 1993 on an appeal of
the Applicant who was requesting that his name be added to
the short list prepared by the Appointment and Promotion
Board for the Vacancy No. 92-M-ESA-210-NY, so that he could
be considered in the selection for the post, or that, should
it be too late, an appropriate compensation be given to him
(...).

8. To decide, given that the selection for the post has
already been implemented, that the Applicant shall be
promoted to P-5 at the next opportunity.

9. To order that the Secretary-General shall pay to the
Applicant an appropriate compensation for the damage
resulting from having unjustly been excluded from

[consideration for] promotion [to] the post above-mentioned.
This damage includes:

(a) A loss in salary ... [which] would cumulate to a little over 31,000 dollars by the time the Applicant would reach retirement age.

...

(c) The moral injury caused by the loss to the professional reputation of the Applicant, ...

..."

Whereas the Respondent filed his answer on 30 June 1994;
Whereas, on 8 August 1994, the Applicant filed written observations;

Whereas, on 11 October 1994, the Tribunal put questions to the Respondent, to which he provided answers on 14 October 1994;

Whereas the Applicant submitted comments on the Respondent's reply on 26 October 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 30 July 1968, on a probationary contract at the P-1 level, as an Assistant Social Affairs Officer in the Department of Economic and Social Affairs, Population Division. He resigned from the Organization, with effect from 1 August 1969. On 2 November 1975, the Applicant re-entered the service of the Organization for the second time, on a two year fixed-term appointment at the P-3 level, as a Population Affairs Officer in the Department of Economic and Social Affairs, Population Division. His appointment was converted to probationary on 1 September 1977 and became permanent on 1 June 1978. On 1 July 1978, the Applicant was transferred to the Department of International Economic and Social Affairs (DIESA), Population Division, Population and Development Section. He was promoted to the P-4 level, with effect from 1 April 1981. On 1 January 1987, he was assigned to the Estimates and Projections Section of the Population Division.

On 30 December 1991, the Applicant applied for the P-5 post of Chief, Population Trends and Structure Section, Population Division, DIESA. Selection for the post was conducted under the Vacancy Management and Staff Redeployment System, in force at the time, established in accordance with the Secretary-General's bulletin ST/SGB/221 of 22 December 1986 and administrative instruction ST/AI/338 of the same date. Six internal and three external candidates applied for the post. Five internal candidates, two women and three men, including the Applicant, were found by the Department to meet all the requirements of the post. Their names were submitted to the Office of Human Resources Management (OHRM), which submitted them in turn to the Appointment and Promotion Board (APB).

On 7 May 1992, the APB established a provisional short list of two candidates for the post and noted that:

" The Board found the above listed women highly qualified for the vacancy in question and at the same time took into account the Secretary-General's bulletin (ST/SGB/237) dated 18 March 1991 on the subject of the improvement of the status of women in the Secretariat."

On 11 May 1992, a Recruitment and Placement Officer, OHRM, informed the Applicant that his name had not been included in the provisional short list of candidates established by the APB. On 13 May 1992, the Applicant instituted a recourse against his non-inclusion in the short list. On 9 July 1992, the APB, having considered the recourse, submitted its final short list of two women candidates for the post. On 16 July 1992, the short list was forwarded by the Officer-in-Charge, Recruitment and Placement Division, OHRM, to the Under-Secretary-General, DIESA, for selection. Also on 16 July 1992, the Applicant was informed that his name had not been included in the final short list. On the same date, he wrote to the Secretary-General, requesting a review of the administrative decision not to short list his name for the post.

On 14 August 1992, the Director of the Population Division recommended a candidate from the short list for the post, noting her

"exceptional expertise and familiarity with the Section's subject matter and her potential leadership ability." On 25 August 1992, the Department notified OHRM that it had selected the recommended candidate.

On 18 August 1992, the Applicant filed a preliminary appeal with the Joint Appeals Board (JAB) and requested "a suspension of action on the short list". On 26 August 1992, the JAB adopted its report on the request for suspension of action which reads, in part, as follows:

"16. It is the unanimous finding of the Panel that the relief requested is appropriate in light of the facts presented and the serious allegations made, which dictate a more intensive investigation, and that a suspension of action should be granted pending the decision on the appeal since the implementation of the action would directly and irreparably injure the Appellant."

On 4 September 1992, the Assistant Secretary-General for Human Resources Management transmitted the JAB report to the Applicant and informed him, inter alia, as follows:

"The Secretary-General has re-examined your request in the light of the Board's report. He has especially been mindful of the following circumstances and considerations:

(a) that the appeal is against the recommendation by an advisory body to the Secretary-General, the Appointment and Promotion Board, of a short list of candidates which was established after that body had thoroughly considered your recourse;

(b) that such recommendation is not an administrative decision within the meaning of staff rule 111.2(a) and (f); even if it were to be regarded as such, it could not be stayed since a final decision on the matter was made prior to receipt of the Board's report by the Secretary-General.

This shows a completed administrative action. The Secretary-General has decided to take no action on your request."

On 27 August 1992, the Applicant submitted his statement of appeal on the merits to the JAB. The JAB adopted its report on

7 April 1993. Its considerations, conclusions and recommendations read, in part, as follows:

"33. The Panel first examined the selection process which led to the contested decision ... After reviewing all the steps ..., the Panel concluded that the provisions of administrative instruction ST/AI/338 and Add.1 to 6 had been duly applied.

...

35. The Panel also considered very carefully the Appellant's contention that 'the Appointment and Promotion Board made no comparison of the merits of the two short-listed women versus [his own] qualifications'... The Panel was perfectly aware of the fact that it could not substitute its judgement for that of the Appellant's department, OHRM and the Appointment and Promotion Board in making an evaluation or a comparison of the merits of applicants for the post. It therefore limited its examination to the Appellant's contention that his name was not short-listed because the Board knew that he was better qualified than the two selected staff members. It reviewed very carefully the files of the case and was unable to find any evidence in support thereof.

36. Regarding ... [Appellant's claim that the contested decision disregarded in particular the requirement for 'equality of opportunity for all staff in the Secretariat'], the Panel ... concluded that the Secretary-General acted in compliance with Article 8 of the Charter, the relevant resolutions of the General Assembly and the Convention on the Elimination of All Forms of Discrimination Against Women in issuing bulletin ST/SGB/237 to improve the status of women in the Secretariat.

37. ..., the Panel was of the view that the Appointment and Promotion Board acted within its mandate and in full compliance with the relevant provisions of the Charter, the Staff Rules and Regulations and the Secretary-General's relevant administrative instructions, in short-listing only two female candidates for the vacancy to be filled.

38. The Panel unanimously:

Finds that the contested decision does not disregard the requirement of 'equality of opportunity for all staff in the Secretariat'.

Concludes that the decision not to short-list the Appellant did not constitute non-observance of his terms of appointment or of any pertinent regulations or rules.

39. The Panel unanimously recommends that the appeal be rejected."

On 12 April 1993, the Under-Secretary-General for Administration and Management transmitted the JAB report to the Applicant and informed him, inter alia, as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has decided, in accordance with the Board's unanimous recommendation, to reject your appeal."

On 19 May 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant is more qualified than either of the two female candidates short-listed for the post, and the decision not to short-list him was motivated by prejudice against his gender, violating Article 8 of the Charter and General Assembly resolutions 44/185 C and 45/239 C.

2. The decision not to short-list the Applicant violated administrative rules and regulations in that:

(a) The APB applied the Secretary-General's promotion policy set forth in ST/SGB/237, which is not applicable to short-listing;

(b) The short-listing of only two candidates violated administrative instruction ST/AI/338/Add.5, paragraph 10, which provides that short lists should normally contain at least three names; and

(c) The APB made no comparison of the merits of the Applicant versus the merits of those short-listed candidates as mandated by administrative instruction ST/AI/338/Add.5, which provides that "the best qualified" shall be short-listed.

3. The instructions in the Secretary-General's bulletin ST/SGB/237 contravene General Assembly resolutions 44/185 C and

45/239 C as they allow the promotion of candidates who are not necessarily the best qualified.

4. The policy of the Secretary-General regarding promotion of women in the Secretariat is based on the false premise that there has been discrimination against women with respect to promotions.

Whereas the Respondent's principal contentions are:

1. The special measures promulgated by the Secretary-General sought to implement Article 8 of the Charter and are in line with the subsequent General Assembly resolutions 44/185 C and 45/239 C.

2. The Secretary-General's instructions gave effect to the mandatory requirements of General Assembly resolutions 44/185 C and 45/239 C without losing sight of considerations of merit, efficiency, competence and integrity.

3. The short-listing of two candidates was within the margin of discretion of the APB.

4. The unequal representation of women in the Secretariat is an Assembly determination of fact.

The Tribunal, having deliberated from 11 October to 4 November 1994, now pronounces the following judgement:

I. The Applicant asks that the Tribunal rescind the decision of the Respondent dated 12 April 1993, which accepted a Joint Appeals Board recommendation, unfavourable to the Applicant, dated 7 April 1993. Alternatively, the Applicant asks that, since the selection to fill the P-5 post for which he had applied has already been made, he be promoted to the P-5 level at the next opportunity. He also claims compensation for injury he suffered by the omission of his name from the short list.

II. There were nine applicants for the post in question, three of whom were external candidates. Five of the candidates, including the Applicant, were found by the Office of Human Resources

Management to meet the requirements of the post and their names were accordingly submitted to the Appointment and Promotion Board (APB). Two were women. The APB established a provisional short list with the names of only the two women candidates. In commenting on this, the APB stated:

"The Board found the above listed women highly qualified for the vacancy in question and at the same time took into account the Secretary-General's bulletin (ST/SGB/237) dated 18 March 1991 on the subject of the improvement of the status of women in the Secretariat."

III. Following notification to the Applicant that he had not been included in the provisional short list, he availed himself of the recourse procedure. He was subsequently notified that he had not been included in the final list. The Applicant asserts that his non-inclusion was solely due to preferential treatment given by the APB to the two women candidates and that, in fact, he was better qualified than either. In keeping with its jurisprudence, the Tribunal will not enter into appraisal of the relative qualifications of the candidates. Instead, as explained below, the Tribunal will examine (1) whether the APB went beyond its assigned areas of responsibility under the Vacancy Management System (VMS) in taking ST/SGB/237 into account as it did, and (2) whether its actions were in keeping with resolutions of the General Assembly, and Article 101(3) of the Charter.

IV. The Tribunal notes that the APB, in commenting on its short list, did not state that the women listed were the candidates best qualified for the vacancy. The APB's words were that the women listed were "highly qualified for the vacancy". These words do not rule out the possibility that other candidates found by the Department to meet the requirements of the post were equally qualified.

V. Because of the ambiguity in the comments of the APB accompanying the short list, the Tribunal requested information as

to the manner in which ST/SGB/237 was taken into account and the nature of the consideration it gave to the other candidates. The information received by the Tribunal discloses that the APB found the qualifications of all of the candidates whose names were submitted to it to be substantially equal. Yet, relying on the language of ST/SGB/237 requiring the promotion of women candidates solely on the basis of gender if they met the requirements of the vacant post, the APB omitted the names of equally qualified males from the short list. The Tribunal must, therefore, consider whether, under ST/AI/338/Add.5 on Vacancy Management and Staff Redeployment Provisional Guidelines for Implementation, it was appropriate for the APB to issue its short list based on ST/SGB/237, and the extent, if any, to which the latter may be implemented under the Charter and relevant resolutions of the General Assembly.

VI. Under the express language of ST/AI/338, and consistent with Article 101(3) of Chapter XV of the Charter, the APB, in preparing a short list, is to determine who among the applicants are best qualified. Normally, as provided in ST/AI/338, a short list should contain the names of at least three candidates, assuming, of course, that no fewer than three are qualified. If, among the qualified candidates being considered by the APB, only two are considered to be best qualified because the gulf between them and the others is substantial, the APB may quite properly submit a short list containing the names of only those two. On the other hand, if three or more candidates have equal qualifications, a reasonable reading of the language of the administrative instruction would mandate their inclusion on the short list.

VII. The APB took into account the part of ST/SGB/237, of 18 March 1991, which states:

"... the following policy shall apply in the area of assignment and promotion:

In departments and offices with less than 35 per cent women overall, and in those with less than 25 per cent women at levels P-5 and above, vacancies overall and in the latter group, respectively, shall be filled, when there are one or more female candidates whose qualifications match all the requirements for a vacant post, by one of these female candidates."

This, the Respondent argues, is a different and lower standard than one calling for candidates "best qualified" to fill a vacancy, and the Respondent also argues that it represents a lawful affirmative action measure for the improvement of the status of women. In the Respondent's view, ST/SGB/237 permits the APB to exclude from a short list men whose qualifications are equal to those of qualified women.

VIII. With regard to ST/SGB/237, the Tribunal considers that its policies, to the extent that they are authorized by the Charter and the General Assembly, may be implemented by an APB in accordance with the functions of the APB specified in ST/AI/338 and its addenda. That administrative instruction defines the role of the APB and has the same effect as a staff rule.

IX. The Tribunal notes that with respect to the submission of short lists under ST/AI/338 and its addenda, the functions of the APB include in relation to the improvement of the status of women, identifying and recommending women who have the potential for taking on work of greater scope and complexity. (See ST/AI/338, Add. 5, dated 2 November 1988, para. 14(g)). In addition, special guidelines were provided relating to seniority. (*Id.*, para. 14(f) and Annex II). However, nothing in ST/AI/338 and its addenda, instructs or authorizes the APB to implement a policy of excluding equally qualified male candidates from a short list in order to ensure that only females can be considered for promotion to a vacant post.

X. ST/SGB/237 was issued in response to the Fifth Report of the Steering Committee for the Improvement of the Status of Women in the Secretariat. This report recommended various specific measures thought to be in keeping with the requests in General Assembly resolutions for continued improvement of the status of women in the Secretariat. The Respondent argues that, as can be seen from the ST/SGB/237 promotion policy, in certain cases, female candidates should be promoted if their qualifications meet all the requirements for a vacant post, without regard to better qualified candidates.

XI. The General Assembly adopted various resolutions for Improvement of the status of women in the Secretariat. These have been cited by the Respondent in support of the validity of a reduced standard for promotion for women as specified in the Secretary-General's bulletin. In its resolution 44/185 of 19 December 1989, the General Assembly, after recalling Articles 8 and 101 of the Charter:

"Urges the Secretary-General to strengthen his efforts to increase the number of women in posts subject to geographical distribution, in particular at the senior and policy-formulating levels, with a view to achieving to the extent possible an overall participation rate of 30 per cent of the total by 1990, taking into account the principle that the paramount consideration shall be the necessity of securing the highest standards of efficiency, competence and integrity and with full respect for the principle of equitable geographical distribution." (Emphasis added)

XII. General Assembly resolution 45/239 on Improvement of the status of women in the Secretariat, dated 21 December 1990, begins by:

"Reaffirming that the United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs ..." (Emphasis added),

and recalling Article 101 of the Charter, the resolution then:

"2. Urges the Secretary-General to continue his efforts to increase the number of women in posts subject to geographical distribution, particularly in senior policy-level and decision-making posts, in order to achieve an overall participation rate of 30 per cent by the end of 1990 and, to the extent possible to 35 per cent by 1995, taking into account the principle that the paramount consideration shall be the necessity of securing the highest standards of efficiency, competence and integrity with full respect for the principle of equitable geographical distribution." (Emphasis added)

XIII. General Assembly resolution 46/100 on Improvement of the status of women in the Secretariat, dated 16 December 1991, after recalling Article 101 and referring to Article 8 of the Charter providing for equal eligibility of men and women, in paragraph 1:

"Urges the Secretary-General, in accordance with the Charter of the United Nations, to accord greater priority to the recruitment and promotion of women in posts subject to geographical distribution, particularly in senior policy-level and decision-making posts, in order to achieve the goals set in resolutions 45/125 and 45/239 C of an overall participation rate of 35 per cent by 1995 and, to the extent possible, 25 per cent in posts at the D-1 level and above by 1995." (Emphasis added)

XIV. In each of the foregoing General Assembly resolutions, which had been adopted before the action of the APB in this case, and which are cited by the Respondent in support of his position, the improvements in the status of women being urged through affirmative action measures were related to the principle of equal treatment for men and women, and were subject to the criterion of securing the highest standards of efficiency, competence and integrity. This criterion was specifically referred to as part of the affirmative action goals in the 1989 and 1990 resolutions and, by reasonable inference, could hardly have been intended to be excluded from application of the 1991 resolution.

XV. It follows that when the APB issued the short list, based on the Secretary-General's bulletin, dated 18 March 1991, this was not in conformity with either the 1989 and 1990 General Assembly

resolutions, or with the subsequent 1991 General Assembly resolution, to the extent that the bulletin was interpreted as purporting to authorize the promotion of candidates solely on the basis of gender if they merely met the requirements of the vacant post without regard to whether there were better qualified candidates for the post.

XVI. In Judgement No. 507, Fayache (1991), paragraph VIII, the Tribunal noted that an averaging technique with respect to seniority that increased the number of female candidates who might be considered for promotion to higher level posts did not purport to authorize the promotion of females whose relative qualifications or merit were lower than male collaterals and therefore was in conformity with Article 101(3) of the Charter. But that is not the situation here, as argued by the Respondent.

XVII. The Tribunal recognizes that the various resolutions for Improvement of the status of women in the Secretariat which have been referred to and statements of the Secretary-General have conceded the existence of an unsatisfactory history with respect to the recruitment and promotion of women that does not accord with Article 8 of the Charter. In such circumstances, the Tribunal considers that Article 8 of the Charter must be regarded as a source of authority for reasonable efforts to improve the status of women. It would be anomalous indeed if this unsatisfactory history had to remain unremedied for an unduly long period. Unless affirmative action measures are taken towards ameliorating the effects of this past history, they will, without doubt, be perpetuated for many years. This is incompatible with the objectives of Article 8, as recognized by the General Assembly. Hence, the Tribunal concludes that Article 8 permits the adoption of reasonable affirmative action measures for improvement of the status of women.

XVIII. In evaluating the reasonableness of affirmative action measures, pertinent provisions of the Charter may not be ignored.

The Tribunal considers that, with respect to affirmative action measures, it would be impermissible to view Article 8 of the Charter as overriding Article 101(3), which states:

"The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity ..."

This language unequivocally establishes a standard under which less qualified persons are not entitled to preferential treatment based on gender. The fundamental principle reflected in Article 101(3) may not be diluted by a desire, however commendable, to overcome past problems.

XIX. Even so, there is room for affirmative action. The Tribunal considers that, as long as affirmative action is required to redress the gender imbalance with which the Secretary-General and the General Assembly have been concerned, Article 8 of the Charter would permit, as a reasonable measure, preferential treatment to women candidates where their qualifications are substantially equal to the qualifications of competing male candidates; obviously such a preference is not needed if a woman's qualifications are superior. However, the APB concluded, in this case, that the Applicant's qualifications were equal to those of the short-listed candidates. It should, therefore, have included, in the short list, the Applicant and the others who were equally qualified. It would then have been for the Department to appraise the candidates and make the selection. In doing so, if it also considered the short listed candidates equally qualified, it would presumably then take affirmative action goals into account. In this instance, the APB, misconceiving its role under ST/AI/338, substituted its judgement for that of the Department, and thus prevented the Department from considering all the candidates found by the APB to be equally qualified. The Applicant's rights were, therefore, not fully respected and the responsibility of the Organization is engaged.

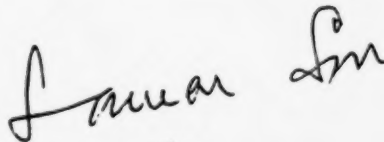
XX. The Tribunal does not consider that, in the circumstances of this case, particularly given that all the male candidates were deemed equally qualified by the APB and that the VMS is no longer in effect, it would be appropriate to rescind the Respondent's decision against adding the Applicant's name to the short list and order a new selection procedure for the post. The post has been filled for more than two years by the successful candidate. Furthermore, it would not be appropriate for the Tribunal to order that the Applicant be promoted to the P-5 level at the next opportunity. It is far from certain that, if the Applicant's name had been on the short list, he or any other male candidate would have been selected and ultimately promoted. It is not for the Tribunal to make such a judgement. For these reasons, the Tribunal will not order the payment of compensation to the Applicant premised on the notion that he would have been promoted had he been short-listed. However, it is appropriate for the Tribunal to order the payment of compensation to the Applicant for the infringement of his right to fair consideration by the APB. This the Tribunal fixes at US\$2,000.

XXI. For the foregoing reasons, the Tribunal orders:

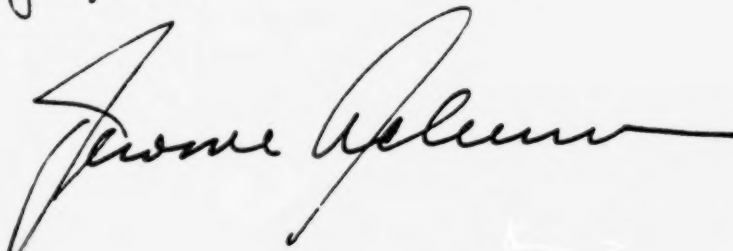
1. The Respondent to pay the Applicant US\$2,000.
2. All other pleas are rejected.

(Signatures)

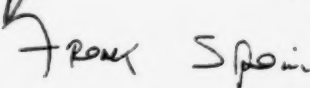
Samar SEN
President



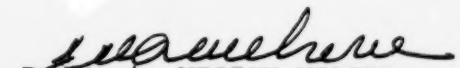
Jerome ACKERMAN
Vice-President



Francis SPAIN
Member



New York, 4 November 1994



R. Maria VICIEN-MILBURN
Executive Secretary